(3)

No. 99-1702

Supreme Court, U.S.
FILED
JUN 21 2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

STATE OF TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS AND THE COMBINED LAW ENFORCEMENT ASSOCIATIONS OF TEXAS IN SUPPORT OF PETITIONER

STEPHEN R. MCSPADDEN
GENERAL COUNSEL
NATIONAL ASSOCIATION OF
POLICE ORGANIZATIONS
750 First Street, N.E.
Washington, D.C. 20002
(202) 842-4420

PATRICK F. PHILBIN
Counsel of Record
THEODORE W. ULLYOT
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

LYNDEE BORDINI
COMBINED LAW ENFORCEMENT
ASSOCIATIONS OF TEXAS
1939 N.E. Loop 410, Suite 210
San Antonio, TX 78217
(210) 826-1899

Counsel for Amici Curiae

June 21, 2000

29pp

QUESTIONS PRESENTED

I.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but factually related, crime nearly a year and a half earlier?

II.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

III.

If the Court decides in *Dickerson v. United States*, No. 99-5525, that *Miranda* is not constitutionally mandated, could *Jackson* – which grafted *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981), into the Sixth Amendment context – constitutionally require the result in this case?

No. 99-1702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

STATE OF TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Petitioner has consented to the filing of this brief, by letter dated June 20, 2000. Respondent, however, has refused to grant consent. Pursuant to Supreme Court Rule 37.2(b), therefore, *amici curiae* the National Association of Police Organizations (NAPO) and the Combined Law Enforcement Associations of Texas (CLEAT) respectfully move for leave to file this brief in support of Petitioner in the above-captioned case.

NAPO is a non-profit organization that represents state and local law enforcement officers throughout the United States. NAPO is a coalition of associations and unions that advances the interests of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 organizations with more than 220,000 sworn law enforcement officers and 11,000 retired officers.

CLEAT is the largest and one of the oldest state law enforcement labor organizations in the State of Texas. CLEAT is a non-profit organization that represents state and local law enforcement officers in Texas and advances the interests and legal rights of law enforcement officers. CLEAT represents over 12,000 peace officers, correctional officers, public safety employees and other board-approved classes of members.

NAPO, CLEAT and the officers they represent have a direct and immediate interest in any case that affects the ability of law enforcement officers to investigate crimes – especially where, as here, the decision below hinders investigative practices and frustrates good-faith, by-the-book police work. *Amici* submit that the perspective of front-line law enforcement officers, as set forth in this brief, is distinct from that of the State of Texas, and will be of substantial assistance to the Court as it considers whether this case is of sufficient importance to the criminal justice system to warrant the Court's attention.

Accordingly, *amici* request leave to file the attached brief in support of Petitioner.

Respectfully submitted,

STEPHEN R. MCSPADDEN
GENERAL COUNSEL
NATIONAL ASSOCIATION OF
POLICE ORGANIZATIONS
750 FIRST STREET, N.E.
WASHINGTON, D.C. 20002
(202) 842-4420

PATRICK F. PHILBIN
Counsel of Record
THEODORE W. ULLYOT
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

LYNDEE BORDINI
COMBINED LAW ENFORCEMENT
ASSOCIATIONS OF TEXAS
1939 N.E. Loop 410, Suite 210
San Antonio, TX 78217
(210) 826-1899

Counsel for Amici

June 21, 2000

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

I. THE DECISION BELOW AGGRAVATES A PLAIN CONFLICT BETWEEN COURTS OF APPEALS AND STATE COURTS OF LAST RESORT CONCERNING THE SCOPE OF A CRIMINAL DEFENDANT'S ABILITY TO WAIVE HIS SIXTH AMENDMENT RIGHT TO COUNSEL UNDER *MICHIGAN v. JACKSON* 4

II. THE DECISION BELOW INTENSIFIES A CONFLICT IN THE LOWER COURTS CONCERNING THE APPLICATION OF THE OFFENSE-SPECIFIC SIXTH AMENDMENT RIGHT TO COUNSEL TO DISTINCT BUT FACTUALLY RELATED CRIMES 10

A. The "Closely Related" Exception to the Offense-Specific Character of the Right to Counsel Is Not Clearly Established in This Court's Precedents 11

B. Lacking Any Guidance from This Court, Lower Courts Have Developed Conflicting and Inconsistent Approaches in Applying the "Closely Related" Exception 13

C. This Case Would Be Resolved Differently Under the Conduct-Based and Fact-Based Tests 16

III. THE DECISION BELOW CREATES AN UNWORKABLE RULE THAT WILL HOBBLE GOOD-FAITH POLICE EFFORTS TO QUESTION SUSPECTS ABOUT UNSOLVED CRIMES AS TO WHICH NO CHARGES HAVE YET BEEN BROUGHT 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Brewer v. Williams, 430 U.S. 387 (1977) 11-13

Commonwealth v. Rainwater, 681 N.E.2d 1218 (Mass. 1997) 13

Dew v. United States, 558 A.2d 1112 (D.C. 1989) 6

Edwards v. Arizona, 451 U.S. 477 (1984) 4

Fearance v. State, 771 S.W.2d 486 (Tex. Crim. App. 1988) (en banc) 17

Genry v. State, 735 So.2d 186 (Miss. 1999) 8

Holloway v. State, 780 S.W.2d 787 (Tex. Crim. App. 1989) 6, 7

In re Pack, 616 A.2d 1006 (Pa. Super. Ct. 1992) 15

Kirby v. Illinois, 406 U.S. 682 (1972) 11

Maine v. Moulton, 474 U.S. 159 (1985) 11, 12

McNeil v. Wisconsin, 501 U.S. 171 (1991) 10, 11

Michigan v. Jackson, 475 U.S. 625 (1986) ... 2-5, 8, 10, 18

Miranda v. Arizona, 384 U.S. 436 (1966) 2

Montoya v. Collins, 955 F.2d 279 (5th Cir. 1992) 7, 9

Moran v. Burbine, 475 U.S. 412 (1986) 19

Patterson v. Illinois, 487 U.S. 285 (1988) 5-7

People v. Anderson, 521 N.W.2d 538 (Mich. 1994) 8

People v. Clair, 828 P.2d 705 (Cal. 1992) 12

People v. Clankie, 530 N.E.2d 448 (Ill. 1988) 15

Smith v. State, 699 So. 2d 629 (Fla. 1997) 8

State v. Carter, 664 So. 2d 367 (La. 1995) 7, 8

State v. Moulton, 481 A.2d 155 (Me. 1984) 13

United States v. Arnold, 106 F.3d 37 (3d Cir. 1997) 14

United States v. Cooper, 949 F.2d 737 (5th Cir. 1991) 15-17

United States v. Covarrubias, 179 F.3d 1219 (9th Cir. 1999) 14

United States v. Gouveia, 467 U.S. 180 (1984) 11

United States v. Hines, 963 F.2d 255 (9th Cir. 1992) 14

United States v. Kidd, 12 F.3d 30 (4th Cir. 1993) 15

United States v. Martinez, 972 F.2d 1100 (9th Cir. 1992) 14

United States v. Melgar, 139 F.3d 1005 (4th Cir. 1998) .. 15

United States v. Williams, 993 F.2d 451 (5th Cir. 1993) 15

Whittlesey v. State, 665 A.2d 223 (Md. 1995) 12, 14

Statutes

Me. Rev. Stat. Ann. tit. 17, § 401 (1983) 13

Tex. Code Crim. Proc. Ann. art. 38.22, § 2 ..... 2, 20

Tex. Penal Code Ann. § 19.03(a)(7) 17

Tex. Penal Code Ann. § 30.02(a)(1) 17

Miscellaneous

Meredith B. Halama, Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule," 1998 U. Ill. L. Rev. 1207 ..... 9, 10

STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Association of Police Organizations (NAPO) is a non-profit organization that represents state and local law enforcement officers throughout the United States. NAPO is a coalition of associations and unions that advances the interests of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 organizations with more than 220,000 sworn law enforcement officers and 11,000 retired officers.

The Combined Law Enforcement Associations of Texas (CLEAT) is the largest and one of the oldest state law enforcement labor organizations in the State of Texas. CLEAT is a non-profit organization that represents state and local law enforcement officers in Texas and advances the interests and legal rights of law enforcement officers. CLEAT represents over 12,000 peace officers, correctional officers, public safety employees and other board-approved classes of members.[1]

Both NAPO and CLEAT and the officers they represent have a direct and immediate interest in any issue that affects the ability of law enforcement officers to investigate crimes.

STATEMENT OF THE CASE

On December 27, 1993, Raymond Levi Cobb brutally murdered and secretly buried Margaret Owings and her sixteen-month-old daughter Kori Rae in the course of burglarizing the Owings' home. Cobb was soon questioned by Walker County police and confessed to the burglary, although he denied any involvement in the disappearance of Margaret and Kori Rae.

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Although petitioner has consented to the filing of this brief, respondent has not, and the *amici* have therefore included a motion for leave to file pursuant to Supreme Court Rule 37.2(b).

Cobb was then indicted for burglary and counsel was appointed for him on that charge. *See* Pet. App. A-4.

After being released on bail on the burglary charge, Cobb moved to Odessa, Texas, over 500 miles away from Walker County. While there, on November 11, 1995, Cobb confessed to his father that he had murdered Margaret and Kori Rae Owings. Cobb's father reported the confession to the Odessa police, who contacted the Walker County Sheriff's office and obtained a warrant for Cobb's arrest on the charge of murder. Unaware that Cobb had been indicted and had counsel in the burglary case, the Odessa police located Cobb and arrested him. The Odessa police fully informed Cobb of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Indeed, they followed a procedure that is *more* protective of a suspect's rights than the guidelines established in *Miranda* and under which they advised Cobb of his rights in writing and received a written waiver signed before a witness. *See* Tex. Code Crim. P. Ann. art. 38.22, § 2. Cobb then signed a written statement confessing to the murders. Pet. App. A-5. Cobb was convicted of the double murder and sentenced to death.

The Texas Court of Criminal Appeals overturned Cobb's conviction on the ground that his confession should have been suppressed because it was taken in violation of Cobb's Sixth Amendment right to counsel. According to the court below, "once the right to counsel attaches to [an] offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." Pet. App. A-6. The court concluded that the double murder was "factually interwoven" with the burglary, and thus that Cobb's Sixth Amendment right to counsel with respect to the murders had attached upon the indictment for the burglary. *See id.* A-7. The court further concluded that under *Michigan v. Jackson*, 475 U.S. 625 (1986), Cobb's waiver of his right to counsel before his interview with the Odessa police was invalid because

Cobb had "asserted" his right to counsel by "accepting [the] appointment [of] counsel" on the burglary charge. Pet. App. A-7. Thus, under its interpretation of *Jackson*, the court applied the rule that "once the right to counsel has attached and has been invoked, any subsequent waiver during police-initiated interrogation is ineffective unless counsel has first given permission for the interrogation." *Id.* at A-6. Finally, the court concluded that it made no difference that the police in Odessa had no knowledge of the burglary indictment in Walker County and that they had acted in good faith by fully *Mirandizing* Cobb before questioning him, because the court should "'impute the State's knowledge from one state actor to another.'" *Id.* at A-7 (quoting *Jackson*, 475 U.S. at 634).

REASONS FOR GRANTING THE WRIT

The decision below implicates two distinct conflicts of authority in the lower courts. First, by holding that the rule of *Michigan v. Jackson* applies even where a defendant has made no affirmative assertion of his right to counsel, the court below improperly expanded the application of *Jackson* and placed itself on one side of a square conflict over the proper scope of that decision. Second, by holding that Cobb's Sixth Amendment right to counsel attached with respect to the murders upon his indictment for the burglary because the crimes were "closely related," the court below again placed itself on one side of an increasingly complex clash between lower court rulings.

The result of the lower court's expansive interpretation of Sixth Amendment protections is a wholly unworkable rule for the law enforcement profession. Here, even though officers in Odessa had no knowledge of Cobb's indictment or retention of counsel on the burglary charge, and even though they scrupulously adhered to all requirements to warn Cobb fully of his rights and to secure a valid waiver before questioning him on the distinct charge of murder, Cobb's confession to a double

murder was suppressed. A rule that requires suppression of a voluntary statement of a confessed murderer obtained through entirely good-faith and proper police work will do nothing but hamstring legitimate police efforts to solve crimes and take offenders off the streets.

I. THE DECISION BELOW AGGRAVATES A PLAIN CONFLICT BETWEEN COURTS OF APPEALS AND STATE COURTS OF LAST RESORT CONCERNING THE SCOPE OF A CRIMINAL DEFENDANT'S ABILITY TO WAIVE HIS SIXTH AMENDMENT RIGHT TO COUNSEL UNDER *MICHIGAN v. JACKSON*.

The court below further aggravated a clear conflict of authority in the lower courts by holding that the rule from *Michigan v. Jackson*, *supra*, should apply in this case to invalidate Cobb's waiver of his right to counsel even though Cobb never made any affirmative assertion of the right. As explained below, the rule applied in this case flatly contradicts the interpretation of *Jackson* applied by the Fifth Circuit and the Supreme Court of Louisiana, under which *Jackson* can be invoked *only* where the defendant has made some positive effort to invoke his right to counsel.

In *Michigan v. Jackson*, this Court determined that once formal criminal proceedings have been initiated against a suspect on a particular charge, thereby triggering attachment of the Sixth Amendment right to counsel, and the suspect has asserted his right to counsel, the suspect cannot subsequently make a valid waiver of the right in a police-initiated interrogation unless counsel is present. In essence, the Court extended to the Sixth Amendment context the rule developed in the context of the Fifth Amendment right to counsel in *Edwards v. Arizona*, 451 U.S. 477 (1981), under which it is conclusively presumed that once a suspect has invoked his right to counsel, any subsequent waiver of the right to counsel in a

police-initiated interrogation will be invalid, unless made in the presence of counsel. The logic of the rule announced in *Jackson* necessarily hinged on the accused's affirmative *assertion* of his right to counsel. The Court, indeed, explained its ruling in precisely those terms. It noted that *Edwards*, on which it relied, "is grounded in the understanding that the *assertion* of the right to counsel is a significant event, and that additional safeguards are necessary when the accused *asks for* counsel." *Jackson*, 475 U.S. at 635 (emphases added; internal citations and quotations omitted).[2]

The Court subsequently explained this logic further in *Patterson v. Illinois*, 487 U.S. 285 (1988). That case involved a defendant who made incriminating statements in a post-indictment interview after being advised of his rights and waiving them. In rejecting the defendant's attempt to suppress his statement under *Jackson*, the Court explained that *Jackson* "turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police." *Id.* at 291 (citation omitted). The Court went on to explain that the "essence of *Edwards* and its progeny" is "[p]reserving the integrity of an accused's choice to communicate with the police only through counsel" – "not barring an accused from making an initial election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Id.* at 291. As a result, the key for securing the benefit of *Jackson*'s limitation on waivers of the Sixth Amendment right to counsel is that the accused must make an affirmative *assertion* of the

---

[2] Writing in dissent, then-Justice Rehnquist emphasized that the Court had *not* held that the mere attachment of the right to counsel would suffice to bar subsequent uncounseled waivers in police-initiated interviews. *See id.* at 640 (Rehnquist, J., dissenting joined by Powell & O'Connor JJ.). Nor could the Court have taken that approach without rendering "nugatory the extensive discussion of 'waiver' in such prior Sixth Amendment cases as *Brewer v. Williams*." *Id.*

right to counsel that is sufficient to indicate to reasonable minds that the accused has decided to deal with the government only through the medium of counsel.

At the same time, however, *Patterson* also contains some ambiguous statements in a footnote that have since spawned confusion in the lower courts. The Court noted that it was a "matter of some significance" that the defendant "had not retained, or accepted by appointment, a lawyer to represent him," and stated that "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Id.* at 290 n.3. Some courts – including the court below – have relied on this language to expand *Jackson* beyond its logical limits to situations where a defendant has made no affirmative assertion of his right to counsel. In so doing, they not only have departed from this Court's precedents, but they have also created an irreconcilable conflict in authority.

On one side of the conflict, the leading decisions expanding the application of *Jackson* to situations where a defendant has not made any effort to invoke his right to counsel are *Dew v. United States*, 558 A.2d 1112 (D.C. 1989), and *Holloway v. State*, 780 S.W.2d 787 (Tex. Crim. App. 1989) (*en banc*). In *Dew*, after the defendant had been indicted and counsel had been appointed for him he was *Mirandized* for a police interview and gave an incriminating statement. The court acknowledged that the defendant "did not affirmatively request counsel within the meaning of *Michigan v. Jackson*," 558 A.2d at 1116 n.4, but nevertheless held that "appointment of counsel as such" is equivalent to the "request for counsel" required by *Jackson*, *id.* at 1116. The court thus suppressed the defendant's statement simply because counsel had been appointed for him. Similarly, in *Holloway*, the court framed the issue before it as being whether an indicted defendant "who had been appointed counsel" could be "capable of waiving his Sixth Amendment

right to counsel." 780 S.W.2d at 791. The court concluded that – even where the defendant never affirmatively asserted his desire to exercise his right to counsel – any waiver made by an indicted defendant who "has been appointed defense counsel," 780 S.W.2d at 795, would be invalid.[3]

In irreconcilable conflict with *Dew* and *Holloway* are *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992), and *State v. Carter*, 664 So. 2d 367 (La. 1995). In *Montoya*, after the defendant was arraigned and appointed counsel he was again *Mirandized* and waived his rights in a police interview. The Fifth Circuit held the waiver valid under *Jackson* because, even though counsel had been appointed, the defendant never made any affirmative effort to invoke his right to counsel; rather, he had remained entirely silent when counsel was appointed for him. The court explained that the critical factor in determining when to apply *Jackson* was just such an affirmative assertion of the right and that, "[f]or purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's desire to deal with police only through counsel." *Montoya*, 955 F.2d at 283 (citation omitted).

In *Carter*, the Supreme Court of Louisiana followed *Montoya*. The case involved a post-arraignment interview of a defendant who had been appointed counsel and who waived his right to counsel at the beginning of the interview. The court

---

[3] The *Holloway* court did initially conclude that *Jackson* required an affirmative assertion of the right to counsel and that, because the defendant had not made such an assertion, *Jackson* did not apply. *See* 780 S.W.2d at 790. The court immediately proceeded, however, to hold that under *Patterson*, because the defendant was represented by counsel, he could not waive his right to counsel without counsel present. The end result was thus effectively to apply the rule from *Jackson* whenever the defendant is represented by appointed counsel, even if the defendant has never affirmatively asserted his desire to exercise his right to counsel.

rejected the view that the appointment of counsel in itself could trigger application of *Jackson* and concluded that the defendant's waiver was valid. *See Carter*, 664 So. 2d at 376-80. Indeed, the court explained that "the Supreme Court has not erected a per se barrier against the validity of waivers made in response to interrogation, *even where defendant is represented by counsel*." *Id.* at 377 (emphasis added). The critical factor for invoking *Jackson* was not the "appointment of counsel itself," but rather the defendant's "'request for counsel'" or "'assertion . . . of his right to counsel.'" *Id.* at 380 (quoting *Jackson*, 475 U.S. at 635). The court, moreover, explicitly acknowledged the conflict between its decision and the holdings in *Dew* and *Holloway*. After describing the holdings in those cases, the court stated in no uncertain terms that it had to "disagree with this approach." *Id.* at 380 n.12.[4]

The decision below further solidifies the conflict outlined above. Assuming that Cobb's Sixth Amendment right to counsel had even attached with respect to the murders on which he had not yet been indicted, *but see infra* pp. 10-17, the lower court's decision to apply the *Jackson* rule and to suppress Cobb's confession, even though Cobb never made any affirmative assertion of his right to counsel, flatly contradicts the rule applied in *Montoya* and *Carter*. Indeed, the court below made the conflict particularly clear by holding that "once [Cobb's] right to counsel attached, he asserted it by accepting [the] appointment [of] counsel." Pet. App. A-7. But *Montoya* explicitly rejected the theory that silently acquiescing in the appointment of counsel could be considered an "assertion" of

---

[4] Other state supreme courts have also followed the approach taken in *Montoya* and *Carter*. *See Genry v. State*, 735 So.2d 186, 195-96 (Miss. 1999); *Smith v. State*, 699 So. 2d 629, 638-39 (Fla. 1997), *cert. denied* 523 U.S. 1008 (1998), and *cert. denied*, 523 U.S. 1020; *People v. Anderson*, 521 N.W.2d 538, 543-44 (Mich. 1994).

the right for purposes of invoking the protections of *Jackson*. *See Montoya*, 955 F.2d at 283. Had the court below applied the rule from *Montoya* or *Carter*, Cobb's confession would not have been suppressed, because there is no suggestion anywhere in the record that Cobb asserted his right to counsel or in any way indicated that he wished to deal with police only through counsel. To the contrary, as Petitioner the State of Texas has explained, on several occasions when police sought to interview Cobb concerning the disappearance of Margaret and Kori Rae Owings, Cobb's counsel on the burglary charge indicated that the police could speak with Cobb without counsel present as long as Cobb agreed, Pet. App. A-4, and there is no suggestion that Cobb himself ever raised an objection to these interviews.

The conflict between the rule applied below and the rule applied by the Fifth Circuit is made even more stark because this case arose in Texas. Under current law in the State of Texas, the scope of a criminal defendant's ability to waive his Sixth Amendment right to counsel in a post-indictment interrogation as a matter of federal constitutional law depends upon the fortuity of whether the prosecution is proceeding in federal or state court.

The split in the lower courts has clearly crystallized over the past decade into a well-defined disagreement over the scope of *Jackson*. The conflict in authority, moreover, has already become sufficiently refined to generate scholarly commentary. *See, e.g.*, Meredith B. Halama, Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule," 1998 U. Ill. L. Rev. 1207. As one author has pointed out, the "ambiguous language" in *Patterson* and *Jackson*, "left open many questions of how different factors might change Sixth Amendment waiver analysis," including whether the outcome would change if there were a "present attorney-client relationship" or "[i]f counsel had been

appointed, but not specifically requested." *Id.* at 1230-31. And as explained above, different courts have reached starkly different conclusions in those situations. This case presents an appropriate vehicle for resolving the conflict in the lower courts, and this Court should grant the petition for certiorari to eliminate the confusion surrounding application of *Jackson*.

II. THE DECISION BELOW INTENSIFIES A CONFLICT IN THE LOWER COURTS CONCERNING THE APPLICATION OF THE OFFENSE-SPECIFIC SIXTH AMENDMENT RIGHT TO COUNSEL TO DISTINCT BUT FACTUALLY RELATED CRIMES.

The Texas Court of Criminal Appeals' decision also deepens another conflict among the lower courts. This Court has long held that the Sixth Amendment right to counsel is offense specific – in other words, that it attaches only to the particular offense charged when formal criminal proceedings are initiated and not to other, uncharged offenses. *See, e.g.*, *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Nevertheless, many lower courts have adopted an exception to the offense-specific character of the Sixth Amendment right when a defendant is involved in multiple crimes that are "closely related." Under this exception, once the Sixth Amendment right attaches to an offense, it attaches to all "closely related" offenses and, similarly, when the right to counsel is asserted for *Michigan v. Jackson* purposes, the assertion applies to all closely related offenses, thus barring police-initiated questioning concerning those offenses unless counsel is present. This exception, however, has never been mandated by a decision of this Court. Moreover, in constructing the "closely related" exception the lower courts have developed different and conflicting tests. This Court should grant certiorari to provide clear guidance concerning whether and when the Sixth Amendment right to counsel requires extending the right from

a particular offense to which it has attached to other "closely related" offenses on which formal criminal proceedings have not yet been initiated.

A. The "Closely Related" Exception to the Offense-Specific Character of the Right to Counsel Is Not Clearly Established in This Court's Precedents.

This Court has often stated the established principle that the Sixth Amendment right to counsel is offense specific. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *see also Maine v. Moulton*, 474 U.S. 159, 180 n.16 (1985); *United States v. Gouveia*, 467 U.S. 180, 188 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). Moreover, the Court has also made clear that, just as the Sixth Amendment right is offense specific, "so also its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific." *McNeil*, 501 U.S. at 175.

Despite the Court's clear statements that the right to counsel is offense specific, many lower courts have created an exception to that rule. The lower courts derive this exception from two cases, *Brewer v. Williams*, 430 U.S. 387 (1977), and *Maine v. Moulton*, 474 U.S. 159 (1985).

In *Brewer*, the Court considered the admissibility of statements made by an accused after he had been indicted for kidnapping a ten year old girl. These statements implicated him in the murder of the girl. Because the police obtained these statements after the accused had obtained a lawyer in the kidnapping proceedings, and after the police agreed with the lawyer not to question the accused, the Court excluded the inculpatory statements. *See Brewer*, 430 U.S. at 400.

In *Moulton*, the Court considered the admissibility of statements obtained by a police informant. Both Moulton and an accomplice were indicted for the theft of several vehicles

and assorted auto parts. They each retained counsel. The accomplice then agreed to aid the police in obtaining incriminating statements from Moulton using wire transmitters and telephone recordings. These recordings were used to obtain seven additional indictments against Moulton, including an indictment for burglary for breaking into a car dealership to steal the auto parts. At trial, Moulton was convicted of burglary and theft in connection with two vehicles and the auto parts. *See Moulton*, 474 U.S. at 167. In a 5-4 decision, the Court held the recordings inadmissible because they were obtained in violation of the Sixth Amendment. *See id.* 474 U.S. at 180.

In both *Brewer* and *Moulton*, the Court excluded evidence obtained after the defendant had been indicted and after he was represented by counsel. Since this excluded evidence related to offenses that were not yet charged, the lower courts have read these cases as presenting an exception to the usual rule that the Sixth Amendment right to counsel is offense specific.

A few courts, however, have questioned whether this exception exists. *See, e.g., Whittlesey v. State*, 665 A.2d 223, 233-34 (Md. 1995) (questioning whether the exception is "compelled by Supreme Court precedent"); *People v. Clair*, 828 P.2d 705, 722 (Cal. 1992) (declaring *Brewer* "no longer vital" in the wake of *McNeil*). Indeed, *Brewer* and *Moulton* provide only tenuous support for an exception to the ordinary rule that the Sixth Amendment right to counsel is offense specific. The incriminating statements in *Brewer* were obtained in violation of an agreement between the police and the defendant's lawyer. The lawyer obtained this agreement before consenting to the unaccompanied transportation of the accused from Davenport, Iowa, to Des Moines. *See Brewer*, 430 U.S. at 390-91. The Court relied on this agreement in explaining its decision, *see id.*, 430 U.S. at 401 n.8, and Justice

Stevens, whose vote was essential to the 5-4 decision, relied heavily on the agreement in his concurring opinion. *See id.*, 430 U.S. at 415 (Stevens, J., concurring).

The incriminating statements in *Moulton* were used to expand the charges against the defendant from theft to burglary. Moulton was then convicted of both burglary and theft. *See State v. Moulton*, 481 A.2d 155, 157 (Me. 1984). Under Maine law, burglary is defined as "enter[ing] or surreptitiously remain[ing] in a structure . . . with the intent to commit a crime therein." Me. Rev. Stat. Ann. tit. 17, § 401 (1983). The elements of the burglary charge in *Moulton* were met with the underlying theft charge combined with breaking into a car dealership. The only exception for closely related offenses suggested by *Moulton*, therefore, applies where the offense for which the accused has been indicted constitutes an element of the offense for which incriminating statements were elicited. This exception is far narrower than the one adopted by many lower courts.

B. Lacking Any Guidance from This Court, Lower Courts Have Developed Conflicting and Inconsistent Approaches in Applying the "Closely Related" Exception.

Because there is no clear precedential support for this exception, the lower courts that have applied it have produced a number of conflicting and contradictory tests. These tests all purport to determine whether offenses are "closely related" or "inextricably intertwined," terms that are used relatively interchangeably. *See, e.g., Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1223 n.5 (Mass. 1997) ("[W]e adopt the 'inextricably intertwined' language, although we, like other courts, recognize that this same test is denoted by various other labels."), *cert. denied*, 522 U.S. 1095 (1998). But while different courts use the same terms, the actual standards they apply to determine whether the Sixth Amendment right to

counsel has attached are varied and, as explained below, can yield starkly different outcomes even on the same fact pattern.

The Ninth Circuit has developed the broadest test for determining whether offenses are "closely related." Under the Ninth Circuit test, offenses that arise out of the same facts are considered closely related for Sixth Amendment purposes. *See United States v. Covarrubias*, 179 F.3d 1219, 1225 (9th Cir. 1999) ("Deciding whether the exception is applicable requires an examination and comparison of all of the facts and circumstances relating to the conduct involved, including the identity of the persons involved (including the victim, if any), and the timing, motive, and location of the crimes."); *United States v. Hines*, 963 F.2d 255, 257 (9th Cir. 1992) (rejecting a claim to the exception when the same offenses were charged, but "the place, time, and persons involved were all different"). Furthermore, statements obtained during police interrogation are inadmissible when there is evidence of deliberate disregard of the Sixth Amendment. *See United States v. Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992) ("[C]ollusion by the prosecutorial authorities to circumvent the right to counsel may cause Sixth Amendment protection to bridge the gap between separate and non-intertwined offenses.").

Some courts have found an exception when the underlying facts are the same, regardless of the lack of evidence of bad faith. In *United States v. Arnold*, 106 F.3d 37 (3d Cir. 1997), the Third Circuit adopted the closely related exception. *See id.* at 42. The court then found that the offenses of witness intimidation and attempted murder were closely related, since "both charges: (1) involve the same witness; (2) arise from the same facts and circumstances; (3) are closely related in time; and, (4) involve conduct related to [the defendant's] attempt to prevent [the same witness] from cooperating . . . ." *Id.* This fact-based approach has been adopted by a number of state courts. *See, e.g., Whittlesey v. State*, 665 A.2d 223, 236 (Md.

1995); *In re Pack*, 616 A.2d 1006 (Pa. Super. Ct. 1992); *People v. Clankie*, 530 N.E.2d 448, 452 (Ill. 1988).

The Fourth Circuit uses a narrower test. Initially, the Fourth Circuit adopted the closely related exception when two offenses had "the same factual predicate." *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993). In *United States v. Melgar*, 139 F.3d 1005 (4th Cir. 1998), the court modified the test, stating that "[a] defendant must also demonstrate that the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses." *Melgar*, 139 F.3d at 1015.

The Fifth Circuit applies an even narrower test. *See United States v. Cooper*, 949 F.2d 737, 744 (5th Cir. 1991). Cooper robbed a convenience store using a sawed-off shotgun. *See id.* at 745. When the police located Cooper's car, they impounded it and, during the inventory search, found the sawed-off shotgun in the trunk. Cooper was later apprehended and charged with aggravated robbery. Counsel was appointed to represent him. Six days later a federal agent interviewed Cooper about the shotgun and Cooper admitted possessing it. Cooper was later charged in federal court with possession of an unregistered firearm. *See Cooper*, 949 F.2d at 740-41.

The Fifth Circuit refused to suppress Cooper's statements about the gun on Sixth Amendment grounds. The court noted that other courts had suppressed such statements upon a finding that charged and uncharged crimes were closely related. Nevertheless, the court refused to exclude the statements in *Cooper* because "the federal and state crimes concern different conduct, although, efficiently for the governments, both prosecutions could use much of the same evidence." *Cooper*, 949 F.2d at 744. In subsequent cases, the Fifth Circuit has continued to interpret the conduct-based exception very narrowly. *See, e.g., United States v. Williams*, 993 F.2d 451, 456 (5th Cir. 1993) ("Only under extremely

narrow circumstances will the Sixth Amendment right to counsel also attach to other offenses.")

C. This Case Would Be Resolved Differently Under the Conduct-Based and Fact-Based Tests.

The multiplicity of tests used by various courts to determine whether offenses are closely related allows the admissibility of incriminating statements to depend upon the fortuity of geography. Furthermore, the multiple tests create confusion for law enforcement officers, who have no bright lines to guide their conduct. In fact, in Texas the "closely related" exception is governed by two different tests applied by the state and federal courts, respectively. The two tests, moreover, would produce different results in this case.

In state court, a fact-based approach governs, and crimes are considered "closely related" if they involve the same or a closely intertwined set of facts. Under that approach, albeit stretched to its limits, the decision below is arguably correct, because the murders arose from loosely the same set of interwoven facts as the burglary.

In contrast, under the conduct-based test adopted by the Fifth Circuit the crimes at issue here would not be considered closely related. As outlined above, in *Cooper*, the Fifth Circuit held that a firearm charge was not closely related to an armed robbery charge, *even when the firearm was used in the robbery* and the evidence demonstrating possession of the firearm was uncovered solely as part of the investigation of the robbery. To the Fifth Circuit, the critical factor was that the two offenses required proof of different conduct. *See Cooper*, 949 F.2d at 744. It did not matter if the two offenses had been committed essentially together so that much of the same evidence arising from the same set of facts could be used to establish the two

crimes. *Id.* As long as the conduct that defined the crimes was different, the crimes would not be considered closely related.

Under that test, Cobb's two crimes in this case would not be considered closely related, because under Texas law burglary and murder are clearly defined by entirely different conduct. *See Fearance v. State*, 771 S.W.2d 486, 493 (Tex. Crim. App. 1988) (en banc) ("[T]he indictment alleged and the proof showed that appellant was engaged in felonious criminal conduct, specifically, burglary at the time [the victim] was murdered. This conduct was a property offense. Therefore, there was a showing of felonious criminal conduct other than the assault which caused the death of [the victim]."). As in *Cooper*, much of the same evidence might be used in the prosecution of both crimes. But, also as in *Cooper*, the specific conduct that constitutes each offense is entirely distinct. The offense of burglary was complete when Cobb entered the Owings' house with the intent to commit theft. *See* Tex. Penal Code Ann. § 30.02(a)(1). The offense of capital murder with which Cobb was charged involved the entirely separate conduct of killing Margaret and Kori Rae, and specifically it was Cobb's conduct in killing two persons that made the crime capital murder. *See* Tex. Penal Code Ann. § 19.03(a)(7). The conduct that constituted the offense of burglary was never used as any element of the crime of murder with which Cobb was charged. Thus, under the Fifth Circuit test, Cobb's indictment for the burglary would *not* have triggered his Sixth Amendment right to counsel with respect to the murder charge.

Once again, this case presents a sharp conflict between the standards of federal constitutional law applied under the Sixth Amendment in the state and federal courts within the state of Texas. This Court should grant certiorari to eliminate the conflicts arising from the application of different versions of the "closely related" test.

III. THE DECISION BELOW CREATES AN UNWORKABLE RULE THAT WILL HOBBLE GOOD-FAITH POLICE EFFORTS TO QUESTION SUSPECTS ABOUT UNSOLVED CRIMES AS TO WHICH NO CHARGES HAVE YET BEEN BROUGHT.

By expansively applying the rule from *Michigan v. Jackson* even to cases where a suspect has not made any affirmative assertion of his right to counsel, and by broadly interpreting the standard for determining whether two offenses are "closely related," the Texas Court of Criminal Appeals created a wholly unworkable rule that will unduly hinder legitimate police efforts to solve crimes. This case thus presents a particularly important opportunity for addressing the plain conflicts among the lower courts outlined above.

Under the decision below, even where police have insufficient evidence to charge a suspect with a crime, and even where that suspect has never made any affirmative assertion of his right to counsel, questioning of the suspect will be barred (absent the presence of counsel) if the unsolved crime is, under some vague standard, factually related to another crime on which charges have been brought. The rule is especially unworkable when combined – as it was here – with an unwarranted and unrealistically broad application of the presumption that knowledge concerning appointment of counsel for a suspect must be imputed to *all* state actors. The facts in this case aptly illustrate the impossible situation in which the decision places police. The court below presumed that officers in Odessa had the same knowledge about counsel being appointed for Cobb as did the sheriff's office in Walker, Texas – over 500 miles away.

That is simply unrealistic, and will have a significant impact in hobbling routine police investigations and interrogations. In any large state, such as Texas or California,

the police forces from different local jurisdictions will often participate in investigating the same or related crimes. Whenever a suspect has moved to a new city, for example, or fled from one local jurisdiction to another while released on bail, a different police force may be called upon to arrest or interrogate a suspect on a new warrant when there has been a break in an unsolved case. Questioning a suspect swiftly to follow up on new leads can often be critical for solving the case. That is particularly true where, as here, the break in the case comes from a suspect's confession to a third party months after the crime. Following up on a suspect who is in a frame of mind to confess can often be the *only* way to resolve a case that might otherwise linger unsolved for years. Efforts to secure Cobb's confession were thus nothing less than effective and proper police work. As this Court has often pointed out, "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (citation omitted). The fact that officers in an entirely different jurisdiction knew that Cobb had counsel on the burglary charge provides no sound basis for discarding the fruits of legitimate and good-faith police work.

Under the rule in this case, moreover, it would not be enough for officers in one jurisdiction simply to ascertain the objective facts about proceedings elsewhere – such as whether a suspect has been indicted on the particular charge they are investigating. In this case, for example, officers in Odessa received a statement from Cobb's father describing Cobb's confession to *murder* and arrested Cobb on a warrant for *murder*. Cobb had never been indicted for that crime. Yet the ultimate holding below was that his Sixth Amendment rights had attached anyway. Under that ruling, law enforcement officers in one local jurisdiction not only would have to

investigate scrupulously all the details of proceedings in another jurisdiction – to determine whether a suspect has been indicted on any crimes, whether counsel had been appointed, and whether the suspect ever asserted his right to counsel – but also would have to act essentially as lawyers to make the subtle determination whether the crime they were investigating was, under some vague standard, sufficiently "closely related" to a crime charged elsewhere for Sixth Amendment rights to extend to the new crime. It is wholly unrealistic to expect police to play such a role.

The only result of such a rule will be hobbling entirely legitimate and good faith police work. In this regard, it bears emphasizing that the officers who interviewed Cobb handled this case absolutely according to the book – there is not even a hint of police misconduct here, nor even of an error that the officers in Odessa could have avoided. To the contrary, the officers in Odessa fully complied with the requirements of *Miranda* before interviewing Cobb. Indeed, they adhered to a procedure under Texas law that is *more* protective of a suspect's rights than the guidelines established in *Miranda* and under which they advised Cobb of his rights in writing and received a written waiver signed before a witness. *See* Tex. Code Crim. Proc. Ann. art. 38.22, § 2. The expansive rules applied by the Texas Court of Criminal Appeals to suppress Cobb's statement in this case were thus particularly unwarranted, because the ordinary procedures police used fully protected Cobb's constitutional rights under this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN R. MCSPADDEN
GENERAL COUNSEL
NATIONAL ASSOCIATION OF
POLICE ORGANIZATIONS
750 FIRST STREET, N.E.
WASHINGTON, D.C. 20002
(202) 842-4420

PATRICK F. PHILBIN
Counsel of Record
THEODORE W. ULLYOT
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

LYNDEE BORDINI
COMBINED LAW ENFORCEMENT
ASSOCIATIONS OF TEXAS
1939 N.E. Loop 410, Suite 210
San Antonio, TX 78217
(210) 826-1899

June 21, 2000

Counsel for Amici